

Keep it simple: Let's not reform jury trials

BY FREDERICK W. LAUCK

Michigan Supreme Court Justice Clifford W. Taylor has published a most interesting, and well written, article on the history and significance of jury trials in the June 2005 Michigan Bar Journal. As Justice Taylor pointed out, the founders of our community clearly understood that "the jury was a bulwark against [governmental] tyranny" and a "check" that keeps the sovereign from "riding roughshod over individual rights."

Hopefully, the rest of our Michigan jurists share Justice Taylor's vision of the jury as the protector of the common man from the government and from the powerful institutions of the establishment and, hopefully, all of our fine judges in the great state of Michigan will also give great deference to jury verdicts.

The courts give great deference to the legislative branch of government and it makes even more sense to defer to juries because jurors — unlike our legislative bodies — are not subjected to special interests groups and lobbyists whispering in their ear telling them how to vote, nor do jurors receive financial contributions from parties hoping to influence their vote. A juror's vote is influenced by the law and justice only and, therefore, the greatest deference of all should be accorded jury verdicts, as jurors decided ultimate questions of accountability in a capitalistic society.

Allow me to share my thoughts with some of the jury reform concepts mentioned in Justice Taylor's article — thoughts based upon 36 years as a trial lawyer trying criminal cases, both as a prosecutor and as a defense attorney, and trying civil cases, both as a plaintiff's lawyer and as a defense attorney.

A trial lawyer is required to put his life, his family and his practice on hold for weeks and months while trial is ongoing. There is no such thing as a good night's sleep or a relaxed moment with family members. The sacrifice is immense as a trial lawyer prepares, rehearses and directs his entire focus on both mastering the infinite details of the case and orchestrating and presenting those details to the jury in such a way that the jury sees, feels and touches the human event portrayed in the court room.

As Clarence Darrow told the jury in Detroit in the 1920s — in the Dr. Ossian

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Sweet case — he never saw a jury who, if you could get them to understand human cause, were not tried and true. Things have not changed in the last 80 years since Dr. Sweet was acquitted. Trying a jury trial is still an immense undertaking just to understand the never-ending details of the case and then, more importantly, to break the case down so the jury can see the human event despite the factual and legal complexities involved.

The basic rules a trial lawyer follows to help the jury to understand the case:

- Keep it simple.
- Don't let the jury get lost in the trees and miss the forest.
- Most of the time, more is less.
- And again, for emphasis, keep it simple.

With respect to the jury reform concepts mentioned in Justice Taylor's fine article, I respectfully suggest no reform is necessary.

Note-taking

I have had the jurors take notes in the last three civil cases I tried (within the last two years), but I question how helpful those notes are. The notes are only as good as the note taker, and I have seen jurors miss the impact of a witness' testimony because they are struggling with a note on a rather unimportant point. Jury duty is not college or even high school and many jurors are not trained at note taking and yet they don't want to be embarrassed and sit idle while other jurors are taking notes. As a mentor lawyer told me almost four decades ago — if you can't put your feet upon the desk and just listen to a client, you'll miss the story. We don't take notes at a movie or a play and yet the director gets his story across.

Asking questions

Allowing jurors to ask questions is obviously helpful to the lawyers because the juror's question invariably discloses what's going on in the juror's mind. The cases I have been involved in where jurors have asked questions, however, just bogged down the proceedings and destroyed the rhythm of the presentation while introducing extraneous matters or jumping ahead. Again, when we go to a

play or a movie we don't ask the director questions in the middle of the presentation. The director has an orchestrated presentation that will tell us exactly what's going on — all in due time. Allowing the jury to ask questions has greater detriment to the flow of the case than benefit. The present no-question system is not broken and it doesn't need to be fixed.

Discussion before deliberation

Allowing jurors to discuss the case before deliberations is a recipe for disaster. The court must monitor and control the flow of information in a trial and the court must monitor and control the juror's deliberations. Why should jurors deliberate at intervals before the entire picture is presented? Why should jurors start forming coalitions with fellow jurors based on opinions formed on only half the case? Why should jurors start thereafter viewing the evidence through the prism of pre-judgment? Suspending judgment until all sides have their day in court is the ideal — why open the door to discussions while the proofs are ongoing? The jury instructions are not given until the end, so why have the jurors discussing a case without the context of the guiding principles of law set forth in the jury instructions? Deliberation at the end of trial is time tested. It has worked for hundreds of years and it still works. Again, it isn't broken.

Judge's summary

Allowing the trial judge to sum up the evidence at the end of trial is the most dangerous proposal of all. It is redundant and just as unnecessary as reading the parties' theories of the case to the jury as part of the jury instructions. If the jury doesn't understand your theory of the case by the time they're instructed, you've lost already — that's why seasoned trial lawyers waive the reading of the theories of their cases during instruction.

Second, trial judges don't want to sum up the evidence. A poll of all of the trial judges in Michigan should prove this point.

Third, a summation by the trial judge is just another layer of confusion that jurors would have to fight through in their deliberations. If we champion jury trials in a democratic society, then trust the jurors and let them decide the case. Jurors are smart and experienced. They don't need

the judge to sum up the evidence.

Fourth, we don't need endless fights at the trial or appellate level on what the judge left in or left out in his summation. We don't need a whole new body of appellate law on judges' summations.

Fifth, judges are only human and, at the end of trial, they also have an opinion on who should prevail. How do you keep the judges' summation to a totally objective presentation? The answer is you don't. Judges are human and human nature tells us that even the most objective judges will show their feelings in a summation, either in factual content, accent or body language.

If you truly champion trial by jury, then let the jury decide. A summation is really a needless attempt to control the jury process and, as such, it erodes and undermines the system of trial by jury. I know judges in England will sum up for the jury, but, as Justice Taylor points out in his fine article, Thomas Jefferson, in the Declaration of Independence, criticized the English for depriving the colonists of the right to jury by their peers. Obviously, the English rule should not influence us 200 years after the fact. We fought the Revolutionary War to throw off that influence.

I respectfully submit that the present jury trial system is not broke. It has served us well for more than 200 years. It does not need reform. More is less. Let's not add to the complication of presenting a jury trial. Let's keep it simple. It doesn't need change or reform. It just needs the healthy respect that Justice Taylor accords it in his article. It just needs the deference it truly deserves — a deference which it has earned in our history as a nation, a deference that should be accorded to it by all branches of government.

When the epoch of history known as the United States of America ends (as it surely will one day), I hope there are still juries out there deliberating on the last day, still uninfluenced by special interests groups, lobbyists and campaign contributions. Thank you, Justice Taylor, for again pointing out for the rest of us the importance of the other branches of government deferring to the great American right of trial by jury.

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